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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. VLADIMIR SOTELO-URENA, Defendant and Appellant.	A153479 (Sonoma County Super. Ct. No. SCR644374)

Before the commencement of his trial on a first degree murder charge, defendant Vladimir Sotelo-Urena sought to waive his right to a jury trial and proceed instead in a bench trial. While the prosecutor expressly consented to the waiver, defense counsel did not, refusing to either consent or object based on a mistaken belief that the decision was defendant's, and defendant's alone. Accordingly, the trial court declined to accept defendant's waiver, and defendant's trial proceeded before a jury, which found him guilty of voluntary manslaughter. On appeal, defendant contends the trial court erred in rejecting his waiver because his counsel impliedly consented to the waiver by not expressly objecting to it. We conclude the trial court did not err, and we thus affirm.

BACKGROUND

Procedural Background

We first encountered defendant on his appeal from a conviction for the first degree murder of Nicholas Bloom. In that matter, we reversed the judgment of conviction, concluding the trial court committed reversible error by excluding expert testimony regarding chronic homelessness. (*People v. Sotelo-Urena* (2016) 4 Cal.App.5th 732.)

Defendant's retrial began on December 4, 2017. After four days of evidence, including the expert testimony erroneously excluded from the first trial, jury deliberations began on December 12. The following day, the jury advised the court it was split on the first degree murder charge. On December 15, after further deliberations proved unsuccessful at producing a verdict, the prosecutor moved to strike the allegation that the murder was willful, deliberate, and premeditated in order to allow the jury to consider second degree murder and lesser included offenses. The trial court granted the motion, and later that day the jury reached a verdict, finding defendant not guilty of second degree murder but guilty of the lesser included offense of voluntary manslaughter. It also found true that defendant personally used a deadly weapon during the offense.

On January 19, 2018, defendant was sentenced to the upper term of 11 years, plus an additional year for the deadly weapon enhancement.

This appeal followed.

Defendant's Request to Proceed by Bench Trial

On November 14, 2017, during a pre-trial conference, defense counsel advised the court that defendant was considering waiving his right to a jury trial and requested that the matter be put over to the next morning for a decision. The next day, defense counsel informed the court that defendant did in fact want to waive his right to a jury trial and proceed with a bench trial. When asked by the court about his decision, defendant stated that he was "not satisfied with the jury pool" and was not confident the jury would be open minded and willing to listen to the evidence. The court told defendant it wanted him to waive a jury trial for the "right reasons," and it was "100 percent confident" it would assemble "a jury of people that are competent, will try the case in a fair and impartial way." Defendant insisted he would prefer a bench trial "[d]eep down in [his] heart" and he would feel more confident with the court deciding his case.

The prosecutor questioned defendant about his decision, explaining how a jury trial would work, detailing the rights he would retain and give up by proceeding with a bench trial, and confirming that defendant was making an informed, free, and voluntary decision. The prosecutor then turned to defense counsel, inquiring whether he had had

adequate time to confer with defendant about the issue and whether he concurred in defendant's decision. Defense counsel gave the following response: "As to that question, Your Honor, I don't believe I can answer that question. I believe by answering that question I would be disclosing my client's confidences and privileged information. I also don't believe that it is my decision. I believe that [defendant] has a fundamental right under the Sixth and Fourteenth Amendments to the United States Constitution to have a trial and not have a trial, as he has a fundamental right to testify or not to testify, as he has a fundamental right to have an attorney or not have an attorney as is the case with *Faretta*.[1] So I'm not going to be answering that question."

The court asked further questions of defense counsel and confirmed that he had advised defendant of the pros and cons of a jury trial versus a bench trial and of his own opinion about defendant proceeding with a bench trial. The prosecutor then waived a jury trial. And after the court asked a few more questions of defendant, it found he had made a knowing, intelligent, and voluntary waiver of his right to a jury trial and accepted his waiver.

Later that afternoon, the matter was recalled at the request of the prosecutor, who was concerned "there was an inadequate consent or agreement to proceed by way of court trial from the defense counsel. Article 1, Section 16, the second sentence, 'A jury may be waived in a criminal cause by the consent of both parties, expressed in open court by the defendant and the defendant's Counsel." It was his view that "if we can't get a record indicating consent or agreement or assent to the waiver of the jury trial so we can proceed by court trial that we are going to have to proceed by way of jury." The following exchange between the court and defense counsel ensued:

"THE COURT: What's your position?

"[DEFENSE COUNSEL]: It remains the same as stated this morning.

"THE COURT: Okay. So I thought in the questioning, I probably wasn't as overt, but you voiced no objection to this and you stated that you believe that ultimately

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[1] *Faretta v. California* (1975) 422 U.S. 806.

the question was one for [defendant] to make, the issue was his to waive. You have not objected to the process. Fair enough?

"[DEFENSE COUNSEL]: I believe that's an accurate representation of the record.

"THE COURT: And I understand you don't want to per se join in the waiver, but you are not objecting to the process and you've indicated that you believe [defendant], you've had enough time to talk to him, correct?

"[DEFENSE COUNSEL]: Yes.

"THE COURT: You've had discussions with him on the subject, correct?

"[DEFENSE COUNSEL]: Yes.

"THE COURT: And do you have any concerns or—because I can understand that you are allowing him to make the decision, but you are his lawyer and he's making the decision with your input, correct?

"[DEFENSE COUNSEL]: He is.

"THE COURT: Is there any other—is there a reason why you won't agree with his decision to go by way of court trial as opposed to jury trial?

"[DEFENSE COUNSEL]: I think that's where we get into my area of concern about disclosing privileged communications and violating my client's confidence, that's why I did not answer the question this morning and rather deferred to what I believe is [defendant's] right to elect or not elect to have a jury trial.

"THE COURT: But I also—I can take from that that you, like many lawyers, would maybe prefer that he have a jury trial, but it is his choice. Do you support that choice? Is there any assent of any kind that you would be willing to put on the record that would give [the prosecutor] some—assuage his concerns about Article 1, Section 16 which says that jury trial can be waived by both sides by the consent of both parties? In some senses you are consenting by not saying anything in objection to that. He's shaking his head yes, but let's hear what he has to say.

"[DEFENSE COUNSEL]: I believe it is [defendant's] decision, as I stated previously, and I have not weighed in one way or the other on the subject explicitly.

"THE COURT: But you are not objecting either.

"[DEFENSE COUNSEL]: I've not explicitly objected to his waiver.

"THE COURT: So what do you say to [the prosecutor's] comment that there has not been a consent by the defense counsel so that we should go back and redo what we just spent the last two days doing?

"[DEFENSE COUNSEL]: I've not said those words. I've not said that I consent or assent or agree to [defendant's] decision. I don't believe that's necessary, and I believe the Court can find, make findings accordingly.

"[THE PROSECUTOR]: At this point I believe that the record is quite clear with regards to [defendant's] wavier. It is quite clear with regards to the People's express waiver. It is not clear with regards to defense counsel's express consent to the waiver of jury trial. Also given the record we have, I don't believe that there would be a sound basis to rely on any implied waiver doctrine. . . ."

The court indicated it was going to take a recess to research the issue, which the prosecutor invited it to do, adding, "I think among the things the Court will learn, the right to a jury trial is a constitutional right that the defendant enjoys. He does not enjoy a constitutional right to a court trial. There are certain requirements that have to be satisfied. [¶] Again the record we have at this point in time, I don't think any implied waiver doctrine, that there was a sufficient record for anyone to rely on an implied waiver doctrine. We need what the Constitution requires. Some expression on the part of defense counsel of a consent or an agreement to proceed by way of court trial having waived jury trial." The court then adjourned so it could conduct further research.

On November 17, following written briefing by the prosecutor, the court announced that its tentative ruling was "to reconsider my finding that there has been an adequate waiver by the defense of the right to a jury trial. I understand [defendant] has waived clearly and unequivocally, but I don't believe based upon the case law that without something affirmative from [defense counsel] that that would be appropriate under the circumstances." The prosecutor agreed, describing the tentative ruling as "not only the correct ruling but it is the safe ruling . . . ." It also agreed with the court that the

instant case was most akin to *People v. Peace* (1980) 107 Cal.App.3d 996, which the prosecutor described as an "invalid waiver case . . . ." After defense counsel submitted the matter, the court rescinded its prior order for a bench trial. Defendant's second trial thus proceeded before a jury.

DISCUSSION

The Constitutions of the United States and California guarantee the right to a jury trial in criminal cases. (U.S. Const., 6th Amend.; Cal. Const., art. I, § 16; *People v. Sivongxxay* (2017) 3 Cal.5th 151, 166; *People v. Daniels* (2017) 3 Cal. 5th 961, 990.) The California Constitution allows for a waiver of this fundamental right, providing that "[a] jury may be waived in a criminal cause by the consent of both parties expressed in open court by the defendant and the defendant's counsel." (Cal. Const., art. I, § 16.) Thus, the defendant does not have a unilateral right to waive trial by jury: the prosecutor and defense counsel must both concur. (*People v. Upshaw* (1974) 13 Cal.3d 29, 33–34; 5 Witkin & Epstein, Cal. Criminal Law, Criminal Trial (4th ed. 2012) § 547, p. 848 ["a defendant does not have a constitutional right to waive a jury trial over his or her attorney's objections; and a trial court may commit reversible error by accepting such an attempted waiver"]; Cal. Criminal Law Procedure and Practice (Cont.Ed.Bar 2016) § 28.13, p. 827.)

A defendant's waiver of a jury trial must be intelligent, knowing, and voluntary. (*People v. Sivongxxay, supra,* 3 Cal.5th at p. 166; *People v. Daniels, supra*, 3 Cal.5th at p. 990.) It must also be verbal and explicit, "express[ed] in words . . . and will not be implied from a defendant's conduct." (*People v. Holmes* (1960) 54 Cal.2d 442, 443–444; accord, *Sivongxxay*, at p. 166; *People v. Collins* (2001) 26 Cal.4th 297, 305.)

A different standard applies to the required waivers by defense counsel and the prosecution. While such consent may, of course, be express, courts have also recognized implied waivers where counsel and the prosecutor acquiesce in defendant's waiver. (*People v. Evanson* (1968) 265 Cal.App.2d 698, 701 ["[W]here an express waiver has been received from the defendant, the acquiescence of defense counsel and the prosecutor will be given effect as implied waivers"]; *People v. Pughsley* (1946) 74 Cal.App.2d 70,

71 [waiver by defense counsel or the prosecutor "may be expressed by any word or act that clearly indicates to the court the wishes of counsel"]; 5 Witkin & Epstein, Cal. Criminal Law, Criminal Trial, *supra*, § 547, p. 849 [courts allow "looser practice" as to consent of defense counsel and prosecution].)

Here, there was no clear indication by defense counsel—either expressly or impliedly—that he consented to defendant's waiver of his right to a jury trial. The court questioned him at length, expressly asking if "there [was] any assent of any kind that [he] would be willing to put on the record . . . ." Defense counsel repeatedly stated he would not weigh in on the subject because he believed—erroneously—that the decision was solely defendant's to make and that stating his position would violate the attorney/client privilege. Defense counsel's refusal to consent when specifically asked precluded a finding that he acquiesced in defendant's waiver. Further, the record does not foreclose the possibility that he would have objected had he correctly understood the law. Defendant himself seemed to indicate that his counsel did not agree with his decision when he said, "I understand Mr. Poulos' respective [*sic*], he's my counsel, and I just feel strongly about this issue." Assuming he meant his counsel's *per*spective, we understand this to mean that defense counsel did not agree with defendant's decision. Likewise, the court inferred from its colloquy with defense counsel that he "like many lawyers, would maybe prefer that [defendant] have a jury trial." Under these circumstances, and particularly in light of defense counsel's equivocal statements, the trial court did not err in finding counsel had not consented—expressly or impliedly—to defendant's jury trial waiver.

Defendant's claim to the contrary contains two fundamental flaws. First, he represents that defense counsel had no objection to his decision to waive a jury trial in favor of a bench trial. This misstates the record. While his counsel declined to expressly object because he believed it was defendant's decision, he did not state he had no objection—two distinct concepts. Defendant goes so far as to claim that "All Parties Agreed to a Bench Trial . . . ." Under no construction of the record can it be said that his counsel *agreed* to a bench trial.

Second, defendant asserts that the mere absence of an objection by defense counsel will be construed as implied consent. As he would have it, "In order to hold a court trial, all that was required of defense counsel was that he not explicitly object." The cases defendant cites in support of this interpretation of the law do not so hold, as it is an incorrect statement of the law. (See *People v. Terry* (1970) 2 Cal.3d 362, 377–378; *People v. Scott* (1997) 15 Cal.4th 1188, 1208–1209; *People v. Evanson*, *supra*, 265 Cal.App.2d at p. 701; *Campbell v. Municipal Court* (1960) 183 Cal.App.2d 790, 793; *People v. Rodriguez* (1959) 175 Cal.App.2d 56, 60–61; *People v. Spencer* (1959) 170 Cal.App.2d 145, 149.) Rather, the law requires *consent* by defense counsel. (Cal. Const., art. I, § 16.) And while, as discussed above, that consent can be implied from the circumstances—and those circumstances can include the absence of an objection—implied consent and the absence of an objection are not necessarily one in the same.

Defendant speculates that his counsel intended to continue representing him after the court initially accepted his waiver, which, he contends, indicated counsel's acquiescence in the waiver. It is true that cases have found an implied waiver where counsel did not object to the waiver and then continued to represent the defendant throughout trial without indicating any objection. For example, in *People v. Brooks* (1957) 154 Cal.App.2nd 631, defense counsel advised the court defendant desired to waive his right to a jury trial, defendant expressly waived his right, and counsel represented him during the bench trial. The Court of Appeal rejected defendant's challenge to the adequacy of his counsel's waiver, holding, "[I]f the defendant unequivocally expresses his waiver of a jury trial in the presence of his counsel and his counsel thereafter continues to represent him throughout the trial without indicating any objection, then his counsel has in effect joined in the waiver." (*Id.* at p. 634; accord, *Campbell v. Municipal Court*, *supra*, 183 Cal.App.2d at p. 793; *People v. Rodriquez*, *supra*, 175 Cal.App.2d at p. 61; *People v. Noland* (1939) 30 Cal.App.2d 386, 388–399; see also *People v. Evanson*, *supra*, 265 Cal.App.2d at p. 701.) These authorities are not controlling here, however, as there was more to the situation than simply the absence of an express objection and continued representation.

Defendant cites *People v. Peace*, *supra*, 107 Cal.App.3d 996, the same case relied on by the trial court and the prosecutor, as "an instructive counterpoint to the facts of the instant case." His reliance on *Peace* is misplaced. In that case, defendant waived his right to a jury trial, and the prosecutor agreed. Defense counsel, however, did not, telling that court that defendant's waiver was against her advice. After confirming that defendant's waiver was intelligent and voluntary, the court accepted the waiver. (*Id.* at pp. 1004–1007.)

On appeal, defendant argued, among other things, that the jury trial waiver was ineffective because defense counsel did not consent to it. (*People v. Peace*, *supra*, 107 Cal.App.3d at p. 1007.) The Attorney General contended that defense counsel impliedly consented because she did not specifically state she did not consent, having merely stated the waiver was against her advice. The court agreed with defendant that defense counsel did not impliedly agree: "If defense counsel and/or the prosecutor state nothing in regard to the waiver, 'the acquiescence of defense counsel and the prosecutor will be given effect as implied waivers.' [Citation.] However, in the instant case defense counsel stated the waiver was against her advice and it cannot be said that defense counsel impliedly waived the right to a jury trial." (*Id.* at p. 1008.)

According to defendant, the circumstances in *People v. Peace*, *supra*, 107 Cal.App.3d 996, are in contrast to those here because, unlike defense counsel in *Peace*, his counsel did not state that he had advised defendant against waiving his right to a jury trial. By this reasoning, consent would be implied any time defense counsel does not advise his or her client against waiving a jury trial. That is not the law, as there could be other circumstances that undermine a finding of implied consent. And, in fact, *Peace* supports the trial court's ruling here because it acknowledged that consent will be implied "[i]f defense counsel and/or the prosecutor state nothing in regard to the waiver." (*Id.* at p. 1008.) That certainly was not the case here, where defense counsel stated many things about the waiver, including declining to give his consent when expressly asked for it by the court.

DISPOSITION

The judgment of conviction is affirmed.

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Richman, Acting P.J.

We concur:

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Stewart, J.

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Miller, J.

People v. Sotelo-Urena (A153479)